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IN THE  
**Supreme Court of the United States**

OCTOBER TERM—1950

**No. 565**

RADIO CORPORATION OF AMERICA, NATIONAL BROADCASTING  
COMPANY, INC., RCA VICTOR DISTRIBUTING CORPORATION,  
*et al.,*

*Appellants,*

*against*

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS  
COMMISSION, and COLUMBIA BROADCASTING SYSTEM, INC.,  
*Appellees,*

PILOT RADIO CORPORATION, *et al.,*

*Intervenors-Appellants.*

**Appeal from the District Court of the United States  
for the Northern District of Illinois, Eastern Division**

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**BRIEF FOR INTERVENOR-APPELLANT  
PILOT RADIO CORPORATION**

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## **Introduction**

This brief is submitted on behalf of Pilot Radio Corporation (hereinafter referred to as "Pilot"), which was permitted by the statutory court below to intervene as a party plaintiff in the action herein (R. 791).

Pilot neither owns nor sponsors any color television system. Its interest in this controversy is that of a manufacturer of television sets. Like many others similarly situated, Pilot has been adversely affected by the order under review and will suffer irreparable harm unless the enforcement and execution of such order is enjoined (R. 450-458).

Pilot is heartily in favor of color television. Aside from purely aesthetic considerations, color television, as a source of new and expanded public interest, provides a desirable field for commercial development. Pilot, however, is not in favor of foisting upon the public an unsatisfactory and inferior system of color television, which will cause the wasteful and unnecessary expenditure of millions of dollars by the public, force a regression of the high standards already achieved in television and result in a disastrous retardation of the nation's substantial television industry. That is precisely the inevitable effect of the order of the Commission.

Inasmuch as the brief for appellants Radio Corporation of America, National Broadcasting Company, Inc. and RCA Victor Distributing Corporation sets forth in detail the opinions below, the jurisdictional basis of the review herein, the statutes involved and other basic information from the record, reiteration here would be superfluous. Accordingly, this brief will be limited to a discussion of the reasons which, it is submitted, establish the illegality of the order in question.

## POINT I

**The order of the FCC violates the Commission's own standards and criteria, and is arbitrary, capricious, and against the public interest.**

Although the literal text of the order under review does not refer to the CBS incompatible color system, its conceded effect and purpose is the approval of that system. Once before, in 1947, the Commission had occasion to consider the CBS system.\* In a report issued on March 18, 1947 (R. 458), the Commission rejected that system. In doing so, certain criteria for the protection of the public were laid down as the *sine qua non* for the approval of any color system. The Commission stated:

"It is obvious that before permitting a new television service to become established on a regular basis, a decision must first be made on fundamental standards. Otherwise, manufacturers of receivers could not start to build receivers, and the public could not purchase receivers with any confidence that they would be able to receive programs from all television stations, or that their receivers would not become useless immediately after they were purchased if the existing stations should change any of the fundamental standards. Under these conditions, it is entirely unlikely that television receivers would be bought on any mass basis.

"Before approving proposed standards, the Commission must be satisfied not only that the system proposed will work, but also that the system is as good as can be expected within any reasonable time in the foreseeable future. In addition, the system should be capable of permitting incorporation of better performance characteristics without requir-

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\* The present CBS system is basically the same except that the field sequential system of 525 lines has been replaced by the present 405 lines.



ing a change in fundamental standards. Otherwise, the danger exists that the standards will be set before fundamental developments have been made, with the result that the public would be saddled with an inferior service, if the new changes were not adopted, or if they were adopted, receivers already in the hands of the public would be rendered useless."

This was a reaffirmation of the basic principles enunciated and followed by the Commission from the very outset. Thus in 1940, when the Commission refused to authorize commercial broadcasting of black and white television, it stated (R. 563-564) that transmission standards must "assure to the public in basic outline a single uniform system of broadcasting which will enable every transmitting station to serve every receiver within its range." Further, "In its regulation of television in the public interest, the Commission, in the light of the evidence before it, has set as its goal unfettered technical development and engineering advance. In dealing with the problem of setting television transmission standards the Commission has, therefore, sought to avoid action which would freeze the state of the art at an unsatisfactory level of performance." Again, "However, a serious question of public interest would arise in the future if the Commission should specify external transmitter performance capabilities differing from the operating capabilities of receivers in the hands of the public. This is because of the resultant possibility that the public's receivers would be incapable of receiving programs emanating from transmitters licensed by the Commission."

In view of the foregoing, the issuance and publication on September 1, 1950, of the Commission's so-called "First Report on Color Television Issues," FCC 50-1064 (R. 95-288) came as a bombshell to the television industry. That report is the ostensible basis for the order now under attack

and contains a summary by the Commission of the hearings held and the Commission's findings and conclusions.

The Commission itself chose to predicate its action on the contents of that report. A reading thereof, however, establishes, without more, that the Commission has acted arbitrarily, unreasonably and unlawfully. It is clear therefrom that the Commission had predetermined the issues and decided, in contravention of its ~~own~~ criteria and principles, to approve the CBS color system.

The CBS system is an incompatible system, so that existing sets can receive no picture whatsoever from CBS color transmission without the addition of an adapter (R. 147). The Commission, therefore, must have recognized that the CBS system did not comply with one of the conditions it had prescribed when the instant hearings on color were initiated. These hearings were commenced pursuant to the Commission's Notice of Further Proposed Rule Making, of July 11, 1949 (R. 26, 112). That notice stated that the Commission proposed to consider changes in transmission standards looking toward color television or other television systems, but only upon a showing that:

- “1. Such system can operate in a 6-megacycle channel;  
and
2. Existing television receivers designed to receive television programs transmitted in accordance with present transmission standards will be able to receive television programs transmitted in accordance with the proposed new standards simply by making relatively minor modifications in such existing receivers.”

Obviously, more than “relatively minor modifications in existing receivers” would have to be made if the CBS color system were adopted.

Confronted with the clear and unambiguous requirements so recently laid down by itself on July 11, 1949, the

Commission could not in so many words repudiate or disregard the same. Instead, the Commission first contended that the scope of the language was not clear (Par. 102),\* a ridiculous position for the author thereof to take. Finally, in the statement of minimum criteria contained in its general conclusions, the Commission omitted the aforesaid requirement upon which the hearings had been initiated (Par. 122).

There were other hurdles and unresolvable dilemmas. The CBS color system had been previously considered by the Commission and, as aforesaid, rejected in a report issued on March 18, 1947. The system so rejected in 1947 was substantially the same system considered by the Commission in its latest hearings, and approved on October 10, 1950. The only difference is that the system rejected in 1947 was a better system than the presently approved CBS system in that the earlier one used a field sequential system of 525 lines making for a higher picture detail than that afforded by the present 405 lines (Par. 90; R. 575).

The reasons for rejecting the CBS system in 1947 applied with even greater force to the CBS system presented in its 1949-50 hearings. In 1947 the Commission stated that the CBS standards had failed to meet the test prescribed by the Commission, namely that the system be "as good as can be expected within any reasonable time in the foreseeable future" and "should be capable of permitting incorporation of better performance characteristics without requiring a change in fundamental standards. Otherwise, the danger exists that the standards will be set before fundamental developments have been made with the result that the public would be with an inferior service, if the new changes were not adopted, or if they were adopted, receivers already in the hands of the public would be rendered useless."

\* Parenthetical citations of paragraphs refer to the numbered paragraphs of the Commission's Report of September 1, 1950, found at R. 95-288.

The Commission found in 1947 that the CBS standards did not "represent the optimum performance which may be expected of a color television system within a reasonable time" (R. 462). At the time of the report of the Commission on September 1, 1950 this was truer than ever. For at that time the industry had already brought to the Commission's attention several developments of large significance, the perfection of which could reasonably be expected in the foreseeable future. Thus the Commission pointed out, among other things, that

"Two developments were demonstrated in this hearing which hold real promise for increasing definition both in color and black and white pictures. One is horizontal interlace and the second is the efficacy of long persistence phosphors in reducing flicker, thus providing the means for decreasing the field rate and increasing the number of lines in the picture. Both of these techniques require further testing and, if successful, may make desirable additional changes in the field and line repetition rate." (Par. 147)

In addition, the tri-color tube being developed by RCA held large promise for significant use in color systems (Pars. 53, 60). These developments and improvements however either could not be utilized in connection with the CBS system (see, *e.g.*, Par. 75), or the possibility of such use had not yet been ascertained (see, *e.g.*, Par. 86). Moreover, with respect to a number of pertinent factors relating to color, the Commission was forced to concede that more information was needed and further time required for additional testing (see comments in Exhibit E, annexed to Pilot's intervening complaint; also Par. 100). Serious deficiencies in the CBS system were also acknowledged, such as the inferior geometric resolution of the CBS picture (Par. 94). The degraded black and white picture received from the CBS color transmission is due to the fact that the CBS system produces 405 lines per picture as com-



pared with the 525 lines per picture in the present monochrome system (Par. 90). The CBS system is accordingly susceptible to greater flicker than in the present monochrome system (Par. 142). More serious perhaps, than any of the foregoing, is the fact that the CBS system, as a practical matter, is limited to a picture of no greater size than 12½ inches, although the tendency of the public, as the Commission stated, is to purchase sizes larger than 12½ inches (Par. 144). The fact is that the public purchase of receivers of 12½ inches in size or less has been practically nonexistent. The Commission also realized, and so stated, that a satisfactory compatible system is preferable to an incompatible system such as the CBS color system. "Compatibility would facilitate for the broadcaster the transition from black and white broadcasting to color broadcasting and would reduce to a minimum the obsolescence problem of present receivers" (Par. 123). As contrasted with the limitations and deficiencies of the CBS system, compatible systems had already revealed high promises for the near future.

Since the Commission recognized "the possibility of new color systems and improvements in existing color systems" (Par. 148) it was required to afford adequate time for the full exploration thereof. Otherwise, in its own words, the danger existed that standards would be set before fundamental developments had been made "with the result that the public would be saddled with an inferior service." Commissioner HENNOCK in her concurring opinion to said report recognized the need for affording such additional time and stated:

"... Still, the improvement which took place during the course of the hearings, a relatively short time when compared to the previous course of television development, was impressive. There are many indications that intense effort is being exerted to overcome the difficulties inherent in compatible color

systems. Off-the-record developments by Hazeltine, General Electric, Color Television, Inc., and RCA may be bringing us a little closer, if not near, to the realization of a practical compatible color system. In any event we should work toward that end with all our energy until the last possible moment, and not foreclose the possibility of its achievement until convinced that it is a practical impossibility" (R. 190).

The obvious, practical and only reasonable course of action under the circumstances was to wait until these developments either were perfected, or, after lapse of a reasonable time, found to be unworkable before any new standards were adopted. The Commission, however, was apparently bent on approving the CBS system. It needed an ostensible excuse for its action. This was provided by a self created problem. Simply stated, the Commission expressed the fear that because of the over increasing number of black and white sets being produced, the number of additional adapters and converters which would have to be added in the event an incompatible system were ultimately adopted constantly increased. The expressed fears of the Commission in this respect, however, are misleading. The Commission's own chairman has indicated that it will cost no more to adapt an existing black and white receiver than it would to build new receivers providing for such adaptation (Exhibit E, annexed to Pilot's intervening complaint, R. 482).

The imaginary horror of aggravating the "problem" of incompatibility caused the Commission to pose the following dilemma:

"Thus two difficult courses of action are open to the Commission. The first course of action is to reopen the record and to have a demonstration on the record wherein a tri-color tube or other technique for displaying large size direct-view pictures could

be tried out on the CBS system. The second course of action is to adopt a final decision now promulgating color standards on the basis of the CBS system with the confidence that since the radio industry has succeeded in creating much larger tube sizes than those demonstrated in 1941 when standards for black and white television were adopted, they would succeed in building apparatus that would eliminate the present limitation in the CBS system as to size of direct view tube (Par. 145).

"The advantage of the first course of action is that the Commission would not be compelled to speculate as to an important basis for its decision but would have a definitive answer on the basis of which to act. \* \* \* The advantage of the second course of action is that it would bring a speedy conclusion to the matters in issue and would furnish to manufacturers a real incentive to build a successful tri-color tube as soon as possible. \* \* \* The disadvantage is that the Commission's determination on an important part of its decision would be based on speculation and hope rather than on demonstrations" (Par. 146).

The answer that the Commission gave to the self-created problem was ingenious. The Commission stated that it would postpone a decision on color if the television manufacturing industry gave it certain requested assurances in order to maintain the *status quo* on compatibility. The manufacturers were requested to assure the Commission by September 29, 1950, that they would shortly commence the manufacture of receivers incorporating certain bracket standards enabling the reception in black and white of the CBS color transmission. If the manufacturers did not provide such assurances, the Commission stated that it would then immediately adopt the CBS system.

As the Commission undoubtedly must have known and expected, the condition prescribed for deferring a decision

on color could not be complied with by the television industry. Firstly, it was physically impossible to build sets capable of operating under the proposed standards within the time limits prescribed by the Commission. Secondly, the "reward" offered for complying with the Commission's request was illusory in that the time proposed for further exploration of compatible systems was wholly inadequate. The Commission's request of the manufacturers was unacceptable for a variety of other reasons, some of which are elaborated upon in Exhibit E annexed to Pilot's intervening complaint (R. 475-482).

As expected, the manufacturers refused to extend the requested assurances. The Commission then approved the CBS system. This was obviously its intention from the outset. If the CBS system were worthy of acceptance, it should have been accepted on September 1, 1950. If it were not worthy of acceptance on September 1, 1950, it should not have been approved on October 10, 1950. The Commission's ready seizure upon the industry's refusal to agree to an unacceptable condition could only have been intended to obscure the weakness of the Commission's predetermined approval of the CBS color system. The report of September 1st, stripped of garnishment, clearly shows that the Commission predicated its action solely on "speculation and hope." This is not a legally supportable basis for the order under review.



**POINT II**

**The correspondence between Senator Edwin C. Johnson and the FCC and CBS is relevant and material and should have been considered.**

The action of the Commission in approving the CBS color system, under the circumstances then obtaining, has necessarily given rise to a number of pertinent questions. Why, for example, the precipitate haste in adopting the CBS system? Why was not further time permitted for perfection and demonstration of other systems? Why did the Commission disregard and drastically depart from statutory standards and its own carefully considered oft-repeated criteria, standards and principles? These and many other pertinent questions are unanswered on the record. If considerations dehors the record induced the Commission to act as it did, such considerations should be brought to light so that the order in question may be properly evaluated in its true perspective. Only in that manner can an otherwise inexplicable action be explained and hence understood and appraised.

The exchange of correspondence between the FCC, CBS and United States Senator Edwin C. Johnson and the latter's public utterances on color television shed considerable light in this respect. Senator Johnson is and has been during the period in question Chairman of the Senate Committee on Interstate and Foreign Commerce. This is the Committee which is concerned, among other things, with matters pertaining to radio and television, which has the veto power over appointments and reappointments to the FCC and which is in a position to influence appropriations for the Commission. As a result it has a life-and-death hold on the FCC. Under these circumstances, it is unrealistic to expect that constant and vigorous pressure exerted by the Chairman would be ignored.

By subpoena *duces tecum*, Pilot called upon CBS and the FCC to produce at the hearing before the statutory Court below, all of their correspondence with Senator Johnson relating to color television (R. 515-517). Such correspondence was produced pursuant to said subpoena but the defendants' motion to quash the subpoena was thereafter granted (R. 873-874). We submit that the production of the documents in question was properly required and that the documents were relevant and material and should have been considered.

The correspondence in question and the public statements of Senator Johnson, which are within the judicial cognizance of the Court, clearly establish a course of conduct calculated to influence the Commission's ultimate determination on color television. The correspondence in question is in the record (R. 797-863; fols. 1172ff., unprinted) and accordingly only brief reference thereto is necessary here to establish the purport thereof.

As far back as May 1949, Senator Johnson indicated that he was dissatisfied with the Commission's reluctance to authorize commercial licensing of color because of the Commission's belief that color television had not been developed fully for the promulgation of minimum standards (Letter of Senator Johnson to Dr. Condon, Director, National Bureau of Standards, copy of which is annexed to the complaint of RCA herein). On August 22, 1949, after witnessing a CBS color demonstration, Senator Johnson wrote to Dr. Frank Stanton, President of the Columbia Broadcasting System, that (R. 841):

"It was a magnificent and utterly convincing proof that color television is here now, and that all that is necessary for it to sweep the nation is for the Federal Communications Commission to remove the road block and promulgate standards for its operation."

Simultaneously therewith, Senator Johnson wrote to Vice Chairman Paul Walker of the FCC to the same effect and stated that it was "contrary to the laws of progress for the Commission to wait until color television is perfect before it approves standards. That sort of reasoning may be logical in a totalitarian or corporate state; it is nonsense in a free enterprise economy such as ours" (R. 843).

A copy of Senator Johnson's letter to Dr. Stanton and Vice Chairman Walker was concurrently sent to Commissioner Jones of the FCC (R. 840).

The implications intended by the foregoing were unmistakable. Senator Johnson as Chairman of the Commerce Committee wanted the CBS color system approved by the FCC without further delay even though it was not perfected and even though converters and adapters would have to be added to existing sets in order to obtain color reception.

This strong advocacy of the CBS system was made at a time which immediately preceded the formal record hearings of the Commission and before the Commission was able to witness an on-the-record demonstration by any of the proponents of color television systems (see Pars. 24-25).

On November 12, 1949, in a letter to the Chairman of the FCC, Senator Johnson wrote further that "compatibility, while desirable, certainly should not be the primary basis for a decision" on color, and he expressed his "earnest hope" that the FCC would quickly promulgate standards for color (R. 845-846). In this connection, it should be noted that of the three systems presented for the Commission's consideration, CBS, RCA and CTI, only the CBS system was an incompatible one.

We do not impute or intend any reflection on the personal integrity of Senator Johnson. Regardless, however,

of his good intentions, the fact remains that his prodding, cajoling and demands culminated in action by the Commission which:

- ran contrary to its own criteria;
- attempted to control the television industry by threats;
- approved a color system which is not as good as that which may be expected in the foreseeable future;
- disregarded impending improvements and developments which were called to its attention;
- disregarded the need for further testing and demonstration;
- created an unfounded fear of incompatibility;
- disregarded the best engineering advices of almost an entire industry;
- paid no heed to the findings of the impartial Condon Committee;
- based its decision not on substantial evidence but rather on speculation and hope; and
- seeks to saddle the industry and the public with an inferior service, a regression of standards and a wasteful and unnecessary expenditure of millions of dollars.

### CONCLUSION

Pilot Radio Corporation respectfully submits that it is clear from the record herein that the order of the FCC was arbitrarily and capriciously adopted in disregard of the public interest. That order should be set aside and the enforcement thereof enjoined so that an opportunity may be given for proper consideration of a perfected compatible system of color television.

Respectfully submitted,

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